TECK LEONG TRADING COMPANY (SUING AS A FIRM)

v.

MOHD TAMRIN BIN ABDUL GHAFAR

HIGH COURT MALAYA, KUALA LUMPUR
DATO' DR. ZAKARIA BIN M. YATIM J.
[SUIT NO. D1-22-229-90]
23 DECEMBER 1993

PRACTICE & PROCEDURE: Appeal against dismissal of plaintiff's application for final judgment against defendant - Plaintiff granting friendly loan to company - Failure by company to pay upon demand - Defendant executing letter of guarantee to settle debt - Failure to comply with terms of guarantee - Allegations of failure of consideration and that friendly loan illegal moneylending transaction - Defendant denying receipt of letter of demand - Whether allegations substantiated - Whether a proper case for summary judgment.

CONTRACT: Plaintiff granting friendly loan to a company repayable upon demand - Company failing to pay - Defendant executing letter of guarantee to settle company's debt in consideration of plaintiff agreeing to withhold immediate legal action against company and granting company more time to pay - Defendant failing to settle debt pursuant to guarantee - Defendant alleging failure of consideration and that friendly loan an illegal moneylending transaction - Whether there was consideration for the guarantee -Whether the principal object of plaintiff's business was moneylending - Defendant denying receipt of notice of demand - Whether substantiated - Whether defendant bound by terms of the guarantee.

This was an appeal by the plaintiff against the dismissal of its application to enter final judgment against the defendant.

By a memorandum of friendly loan signed by the plaintiffs and Perniagaan Muda Bumi Sdn. Bhd. (the company), the plaintiff lent RM150,000 to the company repayable upon demand. Demand was made but the company failed to repay the loan. By a letter of guarantee the defendant agreed to settle the company's debts in consideration of the plaintiff agreeing to withhold taking immediate legal action against the company and granting the company more time to settle the debt. Subsequently, a notice of demand was sent to the defendant by AR registered post but the defendant failed to settle the guaranteed sum.

The defendant contended that there was failure of consideration for the guarantee and that the loan was a moneylending transaction which rendered the guarantee invalid. The defendant denied receiving the notice of demand. The plaintiff submitted that the loan was a friendly loan without any interest and therefore there was no basis for the defendant's allegations. The plaintiff also made reference to particulars of its main business object annexed to its affidavit in support of its submission.

Held:

[1] Since the plaintiff agreed to forbear from suing the company for the said debt and the plaintiff actually did so at the defendant's request there was good consideration in this case.

[2] The Court was satisfied that the principal object of the plaintiff's business was not one of money lending. Furthermore, the defendant did not produce any evidence that this was a moneylending transaction.

[3] The defendant in his amended statement of defence averred that he did not receive the notice of demand from the plaintiff but in his affidavit the defendant admitted receiving the letter of demand. The defendant was bound by the terms of the letter of guarantee executed by him. Although in the letter of guarantee it was not stated that the defendant had to pay on demand, it was provided that the "guarantee shall be enforceable against" him. When the letter of demand was sent to the defendant, the plaintiff had a cause of action against him. This was therefore a proper case for summary judgment.

[Appeal allowed with costs. Judgment entered for the plaintiff as prayed].

Case referred to:
Ngui Mui Khin & Anor. v. Gillespie Bros. & Co. Ltd. [1980] 2 MLJ 9 ***(foll)***

Other sources referred to:
The Modern Contract of Guarantee, J. O'Donovan & J.C. Phillips, (1985) p. 42

For the plaintiff - Ivan Ho; T/n. Mian Lee & Partners
For the defendant - H.H. Tay; T/n. Cheang & Ariff

JUDGMENT

Dr. Zakaria bin M. Yatim J:
This is an appeal by the plaintiff against the decision of the Senior Assistant Registrar who dismissed the plaintiff's application to enter final judgment against the defendant for the sum of RM150,000 together with interest and costs.

The plaintiff is a trading company having its address for business at 23A Jalan Sungai Besi, Kuala Lumpur.

By a memorandum of friendly loan signed by the plaintiffs and Perniagaan Muda Bumi Sdn. Bhd. (the company), the plaintiff lent RM150,000 to the company. The company agreed to pay back the money to the plaintiff upon demand. The company failed to pay the loan.

By a letter of guarantee dated 2 August 1985 the defendant, in consideration of the plaintiff agreeing to withhold from taking immediate legal action against the company and to grant the company more time to settle its debt to the plaintiff, guaranteed the payment of the sum RM150,000. The defendant did not settle the said sum in accordance with the letter of guarantee. Notice of demand was sent to the defendant by an AR registered post on 11 January 1990 but the plaintiff alleged that the defendant failed to pay the same or part thereof.

The defendant in his amended defence denied that the sum of RM150,000 lent to the company was a friendly loan. He contended that it was a money lending transaction. He also denied having guaranteed the repayment of the said loan. He alleged that the guarantee was without consideration. He denied receiving notice of demand from the plaintiff.

Mr. H.H. Tay, Counsel for the defendant submitted that there was failure of consideration. He referred to the memorandum of friendly loan dated 2 August 1985 (Exhibit OHC1 of enclosure 4), and to the letter of guarantee dated 2 August 1985. He further submitted that the loan was a money lending transaction and the guarantee was, according to him, not admissible.

Mr. Ivan Ho, Counsel for the plaintiff submitted that the loan given to the company was a friendly loan without any interest. He said that there was no basis for the defendant to say that the loan was a money lending transaction. He referred to enclosure 26. In that affidavit the plaintiff explained the circumstances in which the loan was given. Paragraphs 5-9 of enclosure 26 state:

> 5. The defendant's contentions that the loan to Perniagaan Muda Bumi Sdn. Bhd., was a moneylending transaction and that oral demands were made to repay the interest were all not true.
>
> 6. The plaintiff's main business object is as importers and dealers in hardware building materials.
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> I annexed herewith marked as exhibit "A" a certified true copy of the plaintiff's business particulars filed with the Registry of Business.
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> 7. The defendant was and is at all times aware that the plaintiff was one of the suppliers of building materials to the housing project in Malacca developed by the said Perniagaan Muda Bumi Sdn. Bhd.
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> 8. The said loan was requested and given to assist the said Perniagaan Muda Bumi Sdn. Bhd., to overcome some cash flow problems encountered by the said Perniagaan Muda Bumi Sdn. Bhd., in the course thereof.
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> 9. No interest was ever charged nor demanded on the said loan.

I shall first deal with the question of consideration. Both the memorandum of friendly loan and the letter of guarantee were signed on the same date i.e. 2 August 1985.

In the letter of guarantee the defendant requested the plaintiff to forbear from taking immediate legal action. It was in consideration of the plaintiff agreeing to withhold from taking immediate legal action against the company that the defendant agreed to repay the company's loan. The first three paragraphs of the letter of guarantee state as follows:

> Whereas Perniagaan Muda Bumi Sdn. Bhd., of 2nd Floor Batu Komplek, 1 Jalan Murai Satu, Kuala Lumpur (hereinafter called "the said debtor") owe your company the sum of RM150,000 in respect of a friendly loan advanced by you to the said debtor.
>
> Whereas, I the undersigned have requested your company to forbear from taking immediate legal action to receive the amount owing by the said debtor and to grant the debtor more time in settling the same.
>
> 1. Now In Consideration of your agreeing to withhold from taking immediate legal action against the debtor, and to grant the said debtor more time in settling the same, I the Undersign, do hereby jointly and severally guarantee the payment of the said sum of RM150,00 owing to you by the said debtor.

In my view since the plaintiff agreed to forbear from suing the company for the said debt and the plaintiff actually did so at the defendant's request there was good consideration in this case. See J. O'Donovan & J.C. Phillips, **The Modern Contract of Guarantee,** (1985) p. 42.

With regard to the defendant's allegation that the friendly loan was a money lending transaction, the question for the Court to decide was a question of fact. It was for the Court to see whether the primary principal object of the plaintiff's business was one of money lending. See *Ngui Mui Khin & Anor. v. Gillespie Bros. & Co. Ltd.* [1980] 2 MLJ 9 @ 12. In that case certain transactions took place between the respondents, a London confirming house and a Singapore company relating to the financing of purchases of

goods by the Singapore company. The appellants gave a guarantee to the respondents with respect to those transactions. The respondents obtained judgment in the Singapore High Court against the Singapore company, and as the judgment remained unsatisfied they sued the appellants on the guarantee. The appellants alleged that the transactions between the respondents and the Singapore company were in essence money lending transactions. The respondents applied for final judgment against the appellants and their application was granted. The appellants appealed to the High Court and their appeal was dismissed. The appellants appealed to the Federal Court. The Federal Court decided on the facts of that case that the transactions were not money lending transactions.

In the present case I was satisfied that the principal object of the plaintiff's business was not one of money lending. See paragraphs 5-9 of the plaintiff's affidavit (enclosure 26) quoted above. The defendant did not produce any evidence that this was a money lending transaction.

The defence next contended that no notice of demand was given to the company to pay the amount due.

In my view this is not a material point for the purpose of the present case. In any event the company, on 30 May 1990 made payment by cheque for a sum of RM100,000 being part payment of the said loan, but the cheque was dishonoured upon presentation. Due notice of dishonour had been given to the defendant.

On 11 January 1990, the plaintiff, through their solicitors sent a demand notice to the defendant by an AR registered post. The defendant, in his amended statement of claim averred that he did not receive the notice of demand from the plaintiff. But in his affidavit (enclosure 21) the defendant admitted receiving the letter of demand dated 11 January 1990.

In paragraph 9, he said, "I further state that no demand has ever been made of the alleged friendly loan until 11 January 1990". He then referred to the letter of demand, "OHC-3" of enclosure (4).

In my opinion the defendant was bound by the terms of the letter of guarantee executed by him. Although in the letter of guarantee, it was not stated that the defendant had to pay on demand, but it provided that the "guarantee shall be enforceable against" him. When the letter of demand was sent to the defendant, the plaintiff had a cause of action against him.

Having considered the affidavit evidence and the documentary evidence, I was satisfied that this was a proper case for summary judgment.

For the reasons stated above, I allowed the appeal with costs and entered judgment for the plaintiff as prayed.